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SENATE BILL

No. 186

Introduced by Senator Murray

(Principal coauthor: Assembly Member Correa)

(Coauthors: Assembly Members Bermudez, Maldonado, and
Simitian)

February 12, 2003

An act to add Article 1.8 (commencing with Section 17529) to Chapter 1 of Part 3 of Division 7 of, *and to repeal Sections 17538.4 and 17538.41 of*, the Business and Professions Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

SB 186, as amended, Murray. Privacy: unsolicited *commercial* e-mail advertising.

Existing law prohibits a person or entity conducting business in the state from e-mailing or causing to be e-mailed documents consisting of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit unless that person or entity establishes a toll-free telephone number or

valid sender operated return e-mail address that a recipient may contact to notify the sender not to e-mail the recipient any further unsolicited documents. Existing law requires that notification of the toll-free telephone number, and a valid address that a recipient may write to, be included on these unsolicited e-mailed documents, and prohibits the e-mailing of these unsolicited advertising documents to a person who has requested not to receive any further unsolicited documents. Existing law requires certain unsolicited e-mail advertisements to contain a heading of “ADV:” or “ADV:ADLT.” A violation of the provisions governing advertising is a misdemeanor.

This bill would *delete these provisions. The bill would instead* prohibit a person or entity located in California from initiating ~~or~~, sending, or advertising in, unsolicited commercial e-mail advertisements. The bill would prohibit a person or entity not located in California from initiating ~~or~~, sending, or advertising in, unsolicited commercial e-mail advertisements sent to a California e-mail address. ~~The bill would provide that if any part of these provisions or their application is held invalid, the invalidity would not affect the other provisions.~~ *The bill would also prohibit a person or entity from collecting e-mail addresses or registering multiple e-mail addresses for the purpose of initiating or sending an unsolicited commercial e-mail advertisement from California or to a California e-mail address. The bill would prohibit a person or entity from sending a commercial e-mail advertisement containing certain falsified, misrepresented, obscured, or misleading information.*

This bill would authorize the recipient of a commercial e-mail advertisement transmitted in violation of these prohibitions, the electronic mail service provider, or the Attorney General to bring an action to recover actual damages. The bill would also authorize these parties to recover liquidated damages of \$1,000 per transmitted message up to \$1,000,000 per incident, as defined, subject to reduction by a court for specified reasons. The bill would also provide for an award of reasonable attorney’s fees and costs to a prevailing plaintiff. The bill would provide that a cause of action in existence prior to its enactment would be governed by the law in effect at the time it arose. The bill would enact other related provisions.

This bill would provide that if any part of these provisions or their applications is deemed invalid, the invalidity would not affect other provisions.



Because a violation of the bill would be a crime, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Article 1.8 (commencing with Section 17529)
2 is added to Chapter 1 of Part 3 of Division 7 of the Business and
3 Professions Code, to read:

4
5 Article 1.8. Restrictions On Unsolicited Commercial E-mail
6 Advertisers
7

8 17529. *The Legislature hereby finds and declares all of the*
9 *following:*

10 (a) *Roughly 40 percent of all e-mail traffic in the United States*
11 *is comprised of unsolicited commercial e-mail advertisements*
12 *(hereafter spam) and industry experts predict that by the end of*
13 *2003 half of all e-mail traffic will be comprised of spam.*

14 (b) *The increase in spam is not only an annoyance but is also*
15 *an increasing drain on corporate budgets and possibly a threat to*
16 *the continued usefulness of the most successful tool of the*
17 *computer age.*

18 (c) *Complaints from irate business and home-computer users*
19 *regarding spam have skyrocketed, and polls have reported that 74*
20 *percent of respondents favor making mass spamming illegal and*
21 *only 12 percent are opposed, and that 80 percent of respondents*
22 *consider spam very annoying.*

23 (d) *According to Ferris Research Inc., a San Francisco*
24 *consulting group, spam will cost United States organizations more*
25 *than ten billion dollars (\$10,000,000,000) this year, including lost*
26 *productivity and the additional equipment, software, and*
27 *manpower needed to combat the problem. California is 12 percent*

1 of the United States population with an emphasis on technology
2 business, and it is therefore estimated that spam costs California
3 organizations well over 1.2 billion dollars (\$1,020,000,000).

4 (e) Like junk faxes, spam imposes a cost on users, using up
5 valuable storage space in e-mail inboxes, as well as costly
6 computer band width, and on networks and the computer servers
7 that power them, and discourages people from using e-mail.

8 (f) Spam filters have not proven effective.

9 (g) Like traditional paper “junk” mail, spam can be annoying
10 and waste time, but it also causes many additional problems
11 because it is easy and inexpensive to create, but difficult and costly
12 to eliminate.

13 (h) The “cost shifting” from senders of deceptive spam to
14 Internet business and e-mail users has been likened to sending junk
15 mail with postage due or making telemarketing calls to someone’s
16 pay-per-minute cellular phone.

17 (i) Many spammers have become so adept at masking their
18 tracks that they are rarely found, and are so technologically
19 sophisticated that they can adjust their systems to counter special
20 filters and other barriers against spam and can even electronically
21 commandeer unprotected computers, turning them into
22 spam-launching weapons of mass production.

23 (j) There is a need to regulate the advertisers who use spam, as
24 well as the actual senders of the spam, because the actual senders
25 can be difficult to track down due to some return addresses that
26 show up on the display as “unknown” and many others being
27 obvious fakes and they are often located offshore.

28 (k) The true beneficiaries of spam are the advertisers who
29 benefit from the marketing derived from the advertisements.

30 (l) In addition, spam is responsible for virus proliferation that
31 can cause tremendous damage both to individual computers and
32 to business systems.

33 (m) Because of the above problems, it is necessary that spam be
34 prohibited and that commercial advertising e-mails be regulated
35 as set forth in this article.

36 17529.1. For the purpose of this article, the following
37 definitions apply:

38 (a) “Advertiser” means a person or entity that advertises
39 through the use of unsolicited commercial e-mail advertisements.

(b) “California electronic mail address” or “California e-mail address” means any of the following:

(1) An e-mail address furnished by an electronic mail service provider that sends bills for furnishing and maintaining that e-mail address to a mailing address in this state.

(2) An e-mail address ordinarily accessed from a computer located in this state.

(3) An e-mail address furnished to a resident of this state.

(c) “Commercial e-mail advertisement” means any electronic mail message initiated for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

(d) “Direct consent” means that the recipient has expressly consented to receive ~~the message~~ *e-mail advertisements from the advertiser*, either in response to a clear and conspicuous request for the consent or at the recipient’s own initiative.

(e) “Domain name” means any alphanumeric designation that is registered with or assigned by any domain name registrar as part of an electronic address on the Internet.

(f) “Electronic mail” or “e-mail” means an electronic message that is transmitted between two or more telecommunications devices, computers, or electronic devices capable of receiving electronic messages, whether or not the message is converted to hard copy format after receipt or is viewed upon transmission or stored for later retrieval. “Electronic mail” or “e-mail” includes electronic messages that are transmitted through a local, regional, or global computer network.

(g) “Electronic mail address” or “e-mail address” means a destination, commonly expressed as a string of characters, to which electronic mail can be sent or delivered. An “electronic mail address” or “e-mail address” may ~~include~~ *consist of* a user name or mailbox and a reference to an Internet domain.

(h) “Electronic mail service provider” means any person, including an Internet service provider, that is an intermediary in sending or receiving electronic mail or that provides to end users of the electronic mail service the ability to send or receive electronic mail.

(i) “Initiate the transmission of a commercial e-mail advertisement” means to transmit or cause to be transmitted a commercial e-mail advertisement or assist in the transmission of

1 a commercial e-mail advertisement by providing electronic mail
2 addresses where the advertisement may be sent, but does not
3 include the routine transmission of the advertisement through the
4 network or system of a telecommunications utility or an electronic
5 mail service provider through its network or system.

6 (j) “Incident” means a single transmission or delivery by an
7 advertiser or sender to a single recipient or to multiple recipients
8 of unsolicited commercial e-mail *advertisement* containing
9 substantially similar content.

10 (k) “Internet” has the meaning set forth in paragraph (6) of
11 subdivision (e) of Section 17538.

12 (l) “Preexisting or current business relationship,” as used in
13 connection with the sending of a commercial e-mail
14 advertisement, means that the recipient has made an inquiry; *and*
15 *has provided his or her e-mail address, or has made an application,*
16 purchase, or transaction, with or without consideration, regarding
17 products or services offered by the sender.

18 Commercial e-mail advertisements sent pursuant to the
19 exemption provided for a preexisting or current business
20 relationship shall provide the recipient of the commercial e-mail
21 advertisement with the ability to “opt-out” from receiving ~~the~~
22 *further commercial e-mail advertisement advertisements* by
23 calling a toll-free telephone number or by sending an
24 “unsubscribe” e-mail to the sender of the commercial e-mail
25 *advertisement*. This opt-out provision does not apply to recipients
26 who are receiving free e-mail service *with regard to commercial*
27 *e-mail advertisements sent by the provider of the e-mail service*.

28 (m) “Recipient” means the addressee of an unsolicited
29 commercial e-mail *advertisement*. If an addressee of an
30 unsolicited commercial e-mail *advertisement* has one or more
31 e-mail addresses to which an unsolicited commercial e-mail
32 *advertisement* is sent, the addressee shall be deemed to be a
33 separate recipient for each e-mail address to which the e-mail
34 *advertisement* is sent.

35 (n) “Routine transmission” means the transmission, routing,
36 relaying, handling, or storing of an electronic mail message
37 through an automatic technical process. “Routine transmission”
38 shall not include the sending, or the knowing participation in the
39 sending, of unsolicited commercial e-mail *advertisements*.

(o) “Sender” means a person or entity who initiates the transmission of an unsolicited commercial e-mail ~~or whose product, service, or Internet Web site is contained in, or accompanied by, an unsolicited commercial e-mail advertisement.~~

(p) “Unsolicited commercial e-mail advertisement” means a commercial e-mail advertisement sent to a recipient who meets both of the following criteria:

(1) The recipient has not provided direct consent to receive ~~the commercial e-mail advertisement.~~ *advertisements from the advertiser.*

(2) The recipient does not have a preexisting or current business relationship, as defined in subdivision (l), with the advertiser promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit. ~~17529.1.~~

17529.2. Notwithstanding any other provision of law, a person or entity may not do either of the following:

(a) Initiate or send an unsolicited commercial e-mail advertisement from California or advertise in an unsolicited commercial e-mail advertisement sent from California.

(b) Initiate or send an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to a California electronic mail address.

(c) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect any other provision or application that can be given effect without the invalid provision or application.

~~17529.2. (a) (1) In addition to any other remedies provided by this article or by any other provisions of law, a recipient of an unsolicited commercial e-mail advertisement transmitted in violation of Section 17529.1, the electronic mail service provider, or the Attorney General may bring an action to recover both of the following:~~

~~(A) Actual damages.~~

~~(B) Liquidated damages of one thousand dollars (\$1,000) for each unsolicited commercial e-mail advertisement transmitted in violation of Section 17529.1, up to one million dollars (\$1,000,000) per incident.~~

~~(2) The recipient, the electronic mail service provider, or the Attorney General, if the prevailing plaintiff, may also recover reasonable attorney's fees and costs.~~

~~(3) However, there shall not be a cause of action against an electronic mail service provider that is only involved in the routine transmission of the unsolicited commercial e-mail advertisement over its computer network.~~

~~(b) If the court finds that the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively prevent unsolicited commercial e-mail advertisements that are in violation of this article, the court shall reduce the liquidated damages recoverable under subdivision (a) to a maximum of one hundred dollars (\$100) for each unsolicited commercial e-mail advertisement, or a maximum of one hundred thousand dollars (\$100,000) per incident.~~

17529.3. Nothing in this article shall be construed to limit or restrict the adoption, implementation, or enforcement by a provider of Internet access service of a policy of declining to transmit, receive, route, relay, handle, or store certain types of electronic mail messages.

17529.4. (a) It is unlawful for any person or entity to collect electronic mail addresses posted on the Internet if the purpose of the collection is for the electronic mail addresses to be used by a sender to do either of the following:

(1) Initiate or send an unsolicited commercial e-mail advertisement from California, or advertise in an unsolicited commercial e-mail advertisement sent from California.

(2) Initiate or send an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to California electronic mail address.

(b) It is unlawful for any person or entity to use an electronic mail address obtained by using automated means based on a combination of names, letters, or numbers to do either of the following:

(1) Initiate or send an unsolicited commercial e-mail advertisement from California, or advertise in an unsolicited commercial e-mail advertisement sent from California.

(2) Initiate or send an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise

1 in an unsolicited commercial e-mail advertisement sent to a
2 California electronic mail address.

3 (c) It is unlawful for any person to use scripts or other
4 automated means to register for multiple electronic mail accounts
5 from which to do, or to enable another person to do, either of the
6 following:

7 (1) Initiate or send an unsolicited commercial e-mail
8 advertisement from California, or advertise in an unsolicited
9 commercial e-mail advertisement sent from California.

10 (2) Initiate or send an unsolicited commercial e-mail
11 advertisement to a California electronic mail address, or advertise
12 in an unsolicited commercial e-mail advertisement sent to a
13 California electronic mail address.

14 17529.5. ~~(a)~~ It is unlawful for any person or entity to
15 advertise using ~~an unsolicited~~ a commercial e-mail advertisement
16 either sent from California or sent to a California electronic mail
17 address under any of the following circumstances:

18 ~~(1)~~

19 (a) The commercial e-mail advertisement contains or is
20 accompanied by a third party's domain name without the
21 permission of the third party.

22 ~~(2)~~

23 (b) The commercial e-mail advertisement contains or is
24 accompanied by falsified, misrepresented, obscured, or forged
25 header information. *This paragraph does not apply to truthful*
26 *information used by a third party who has been lawfully authorized*
27 *by the advertiser to use that information.*

28 ~~(3)~~

29 (c) The commercial e-mail advertisement has a subject line that
30 a person knows would be likely to mislead a recipient, acting
31 reasonably under the circumstances, about a material fact
32 regarding the contents or subject matter of the message.

33 17529.8. (a) (1) *In addition to any other remedies provided*
34 *by this article or by any other provisions of law, a recipient of an*
35 *unsolicited commercial e-mail advertisement transmitted in*
36 *violation of this article, an electronic mail service provider, or the*
37 *Attorney General may bring an action against an entity that*
38 *violates any provision of this article to recover either or both of the*
39 *following:*

40 (A) *Actual damages.*

1 (B) Liquidated damages of one thousand dollars (\$1,000) for
2 each unsolicited commercial e-mail advertisement transmitted in
3 violation of Section 17529.2, up to one million dollars
4 (\$1,000,000) per incident.

5 (2) The recipient, an electronic mail service provider, or the
6 Attorney General, if the prevailing plaintiff, may also recover
7 reasonable attorney's fees and costs.

8 (3) However, there shall not be a cause of action against an
9 electronic mail service provider that is only involved in the routine
10 transmission of the unsolicited commercial e-mail advertisement
11 over its computer network.

12 (b) If the court finds that the defendant established and
13 implemented, with due care, practices and procedures reasonably
14 designed to effectively prevent unsolicited commercial e-mail
15 advertisements that are in violation of this article, the court shall
16 reduce the liquidated damages recoverable under subdivision (a)
17 to a maximum of one hundred dollars (\$100) for each unsolicited
18 commercial e-mail advertisement, or a maximum of one hundred
19 thousand dollars (\$100,000) per incident.

20 17529.9. The provisions of this article are severable. If any
21 provision of this article or its application is held invalid, that
22 invalidity shall not affect any other provision or application that
23 can be given effect without the invalid provision or application.

24 SEC. 2. Section 17538.4 of the Business and Professions
25 Code is repealed.

26 ~~17538.4. (a) No person or entity conducting business in this~~
27 ~~state shall electronically mail (e-mail) or cause to be e-mailed~~
28 ~~documents containing unsolicited advertising material for the~~
29 ~~lease, sale, rental, gift offer, or other disposition of any realty,~~
30 ~~goods, services, or extension of credit unless that person or entity~~
31 ~~establishes a toll-free telephone number or valid sender operated~~
32 ~~return e-mail address that the recipient of the unsolicited~~
33 ~~documents may call or e-mail to notify the sender not to e-mail any~~
34 ~~further unsolicited documents.~~

35 ~~(b) All unsolicited e-mailed documents subject to this section~~
36 ~~shall include a statement informing the recipient of the toll-free~~
37 ~~telephone number that the recipient may call, or a valid return~~
38 ~~address to which the recipient may write or e-mail, as the case may~~
39 ~~be, notifying the sender not to e-mail the recipient any further~~

~~unsolicited documents to the e-mail address, or addresses, specified by the recipient.~~

~~The statement shall be the first text in the body of the message and shall be of the same size as the majority of the text of the message.~~

~~(e) Upon notification by a recipient of his or her request not to receive any further unsolicited e-mailed documents, no person or entity conducting business in this state shall e-mail or cause to be e-mailed any unsolicited documents to that recipient.~~

~~(d) This section shall apply when the unsolicited e-mailed documents are delivered to a California resident via an electronic mail service provider's service or equipment located in this state. For these purposes "electronic mail service provider" means any business or organization qualified to do business in this state that provides individuals, corporations, or other entities the ability to send or receive electronic mail through equipment located in this state and that is an intermediary in sending or receiving electronic mail.~~

~~(e) As used in this section, "unsolicited e-mailed documents" means any e-mailed document or documents consisting of advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit that meet both of the following requirements:~~

~~(1) The documents are addressed to a recipient with whom the initiator does not have an existing business or personal relationship.~~

~~(2) The documents are not sent at the request of, or with the express consent of, the recipient.~~

~~(f) As used in this section, "e-mail" or "cause to be e-mailed" does not include or refer to the transmission of any documents by a telecommunications utility or Internet service provider to the extent that the telecommunications utility or Internet service provider merely carries that transmission over its network.~~

~~(g) In the case of e-mail that consists of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit, the subject line of each and every message shall include "ADV:" as the first four characters. If these messages contain information that consists of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services,~~

1 or extension of credit that may only be viewed, purchased, rented,
2 leased, or held in possession by an individual 18 years of age and
3 older, the subject line of each and every message shall include
4 “ADV:ADLT” as the first eight characters.

5 (h) An employer who is the registered owner of more than one
6 e-mail address may notify the person or entity conducting business
7 in this state e-mailing or causing to be e-mailed documents
8 consisting of unsolicited advertising material for the lease, sale,
9 rental, gift offer, or other disposition of any realty, goods, services,
10 or extension of credit of the desire to cease e-mailing on behalf of
11 all of the employees who may use employer-provided and
12 employer-controlled e-mail addresses.

13 (i) This section, or any part of this section, shall become
14 inoperative on and after the date that federal law is enacted that
15 prohibits or otherwise regulates the transmission of unsolicited
16 advertising by electronic mail (e-mail).

17 *SEC. 3. Section 17538.41 of the Business and Professions*
18 *Code is repealed.*

19 17538.41. (a) (1) Except as provided in subdivision (b), (c),
20 or (d), no person or entity conducting business in this state shall
21 transmit or cause to be transmitted a text message advertisement
22 to a cellular telephone or pager equipped with short message
23 capability or any similar capability allowing the transmission of
24 text messages. A text message advertisement is a message, the
25 principal purpose of which is to promote the sale of goods or
26 services to the recipient, consisting of advertising material for the
27 lease, sale, rental, gift offer, or other disposition of any realty,
28 goods, services, or extension of credit.

29 (2) This section shall apply when a text message advertisement
30 is transmitted to a telephone number assigned for cellular
31 telephone or pager service to a California resident.

32 (b) This section shall not apply to text messages transmitted at
33 the direction of a person or entity offering cellular telephone or
34 pager service if the subscriber is offered an option to not receive
35 those text messages.

36 (c) This section shall not apply to text messages transmitted by
37 a business that has an existing relationship with the subscriber if
38 the subscriber is offered an option not to receive text messages
39 from that business.

1 ~~(d) This section shall not apply to text messages transmitted by~~
2 ~~an affiliate of a business that has an existing relationship with the~~
3 ~~subscriber, but only if the subscriber has provided consent to the~~
4 ~~business with which he or she has that relationship to receive text~~
5 ~~messages from affiliates of that business. “Affiliate” means any~~
6 ~~company that controls, is controlled by, or is under common~~
7 ~~control with, another company.~~

8 ~~(e) Subdivision (a) shall not impose an obligation on a person~~
9 ~~or entity offering cellular or pager service to control the~~
10 ~~transmission of a text message unless the message is transmitted~~
11 ~~at the direction of that person or entity.~~

12 *SEC. 4.* A cause of action that is in existence before the
13 effective date of this act shall not be affected by this act, but shall
14 instead be governed by the law that was in effect at the time the
15 cause of action arose.

16 ~~*SEC. 3.*~~

17 *SEC. 5.* No reimbursement is required by this act pursuant to
18 Section 6 of Article XIII B of the California Constitution because
19 the only costs that may be incurred by a local agency or school
20 district will be incurred because this act creates a new crime or
21 infraction, eliminates a crime or infraction, or changes the penalty
22 for a crime or infraction, within the meaning of Section 17556 of
23 the Government Code, or changes the definition of a crime within
24 the meaning of Section 6 of Article XIII B of the California
25 Constitution.

